

EX PARTE OR LATE FILED

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

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February 18, 1997

RECEIVED
FEB 18 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

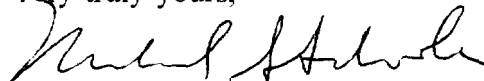
Re: **EX PARTE PRESENTATION**
MM Docket No. 92-260 and CS Docket No. 95-184

Dear Mr. Caton:

Enclosed are four copies of letters sent on behalf of Comcast Cable Communications, Inc. by Mr. Philip J. Kantor of the firm of Bienstock and Clark to Mr. Lawrence A. Walke, Ms. Suzanne Toller, and Ms. Anita L. Wallgren in connection with the above-referenced proceedings.

If there are any questions concerning this matter, please let me know.

Very truly yours,



Michael S. Schooler

MSS/rb
Enclosures

No. of Copies rec'd
List ABCDE

012

BIENSTOCK & CLARK
A Partnership Including Professional Associations
FIRST UNION FINANCIAL CENTER
SUITE 3160
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-2367
(305) 373-1100
TELECOPIER (305) 358-1226

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

3340 Ocean Park Boulevard, Suite 3075
Santa Monica, California 90405
(310) 314-8660
Telecopier (310) 314-8662

Philip J. Kantor

January 31, 1997

EX PARTE OR LATE FILED

Lawrence A. Walke, Esq.
Senior Attorney
Federal Communications Commission
Cable Services Bureau
2033 M Street, N.W.
Suite 400
Washington, D.C. 20554

Re: **In-Home Wiring**

Dear Mr. Walke:

I would like to take this opportunity to thank you and John Logan for meeting with Michael Schooler and I last week concerning the in-home wiring issues that is presently before the Commission.

Pursuant to your request, I am enclosing copies of two contracts between cable operators and building owners in order to show you the language that discusses ownership of the wires. The first one is between Cox Cable and the owners from the lawsuit against Heartland Wireless that Cox won last summer. As you recall, that is the one which I explained that Heartland Wireless attempted to argue that since the agreement only uses the word "equipment", it did not include wires or cables (See Section 3 of the Agreement). The jury, however, did not agree, and found that the cables were not fixtures and remained the personal property of Cox. Tab 11 of the booklet I provide you is the Temporary Injunction that the Court granted finding that Cox owns the cables.

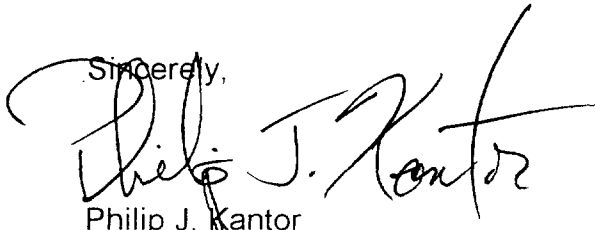
The second agreement is between Communications & Cable of Chicago, Inc. and an apartment owner. The language concerning ownership of the cables is found in the third paragraph after the *Therefore* clause. Further, this agreement is an example of one in which the cable operator was granted a **non-exclusive** easement to serve the property for "so long as the right-of-way shall be utilized for the purpose for which this easement is granted." See second to last full paragraph. Thus, while the cable operator has the ability under the easement to serve this property for a long period of time, it is not on an exclusive basis.

I am also enclosing two additional documents. One is a memorandum from OpTel to the residents of Allington Towers in Hollywood, Florida, informing them that

Lawrence A. Walke, Esq.
January 31, 1997
Page 2

OpTel will be "installing new inside wiring within each individual unit".. The second document is a Temporary Restraining Order from Circuit Court of Cook County, Illinois in favor of Communications & Cable of Chicago, Inc., in which the Court found that it is the owner of the internal equipment and coaxial cable within certain apartment buildings in Chicago and restrained Preferred Entertainment from using that equipment and cable in any manner.

Again, I would like to thank you and Mr. Logan for taking the time to meet with Michael Schooler and I concerning this important issue. I hope we were able to answer some of your questions. If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

Philip J. Kantor

PJK/pc
Enclosures

cc: John E. Logan, Esq. (W/encls.)
Michael Schooler, Esq. (W/encls.)

RECEIVED

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COMMISSION
OFFICE OF SECRETARY

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Santa Monica, California 90405
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Philip J. Kantor

January 31, 1997

Suzanne Toller, Esq.
Legal Advisor
Office of Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **In-Home Wiring**

Dear Ms. Toller:

I would like to take this opportunity to thank you for meeting with Michael Schooler and I last week concerning the in-home wiring issue that is presently before the Commission.

Pursuant to our discussion, I am enclosing a copy of the Fourth Circuit Court of Appeals decision in *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995). The discussion by the Court of the damages suffered by Adelphia as a result of Defendants' tortious interference begins at page 1124. Additionally, the Court discusses ownership of the wires at page 1122, and the Virginia Code concerning demand of payment to landlord by cable providers at the bottom of 1122 through 1124.

I am enclosing two additional documents. One is a memorandum from OpTel to the residents of Allington Towers in Hollywood, Florida, informing them that OpTel will be "installing new inside wiring within each individual unit". The second document is a Temporary Restraining Order from Circuit Court of Cook County, Illinois in favor of Communications & Cable of Chicago, Inc., in which the Court found that it is the owner of the internal equipment and coaxial cable within certain apartment buildings in Chicago and restrained Preferred Entertainment from using that equipment and cable in any manner.

Suzanne Toller, Esq.
January 31, 1997
Page 2

Again, I would like to thank you for taking the time to meet with Michael Schooler and I concerning this important issue. I hope we were able to answer some of your questions. If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Philip J. Kantor". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Philip J. Kantor

PJK/pc
Enclosures

cc: Michael Schooler, Esq. (W/encls.)

BIENSTOCK & CLARK

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Philip J. Kantor

January 31, 1997

Anita L. Wallgren, Esq.
Legal Advisor
Office of Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Re: **In-Home Wiring**

Dear Ms. Wallgren:

I would like to take this opportunity to thank you for meeting with Michael Schooler and I last week concerning the in-home wiring issue that is presently before the Commission.

Pursuant to your request, I am enclosing a copy of the Fourth Circuit Court of Appeals decision in *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995). The discussion by the Court of the damages suffered by Adelphia as a result of Defendants' tortious interference begins at page 1124. Additionally, the Court discusses ownership of the wires at page 1122, and the Virginia Code concerning demand of payment to landlord by cable providers at the bottom of 1122 through 1124.

I am enclosing two additional documents. One is a memorandum from OpTel to the residents of Allington Towers in Hollywood, Florida, informing them that OpTel will be "installing new inside wiring within each individual unit". The second document is a Temporary Restraining Order from Circuit Court of Cook County, Illinois in favor of Communications & Cable of Chicago, Inc., in which the Court found that it is the owner of the internal equipment and coaxial cable within certain apartment buildings in Chicago and restrained Preferred Entertainment from using that equipment and cable in any manner.

Anita L. Wallgren, Esq.
January 31, 1997
Page 2

Again, I would like to thank you for taking the time to meet with Michael Schooler and I concerning this important issue. I hope we were able to answer some of your questions. If I can be of any further assistance, please do not hesitate to call me.

Sincerely,



Philip J. Kantor

PJK/pc
Enclosures

cc: Michael Schooler, Esq. (W/encls.)

MULTIPLE DWELLING UNIT
CABLE ACCESS AGREEMENT

AGREEMENT, made this 28 day of November, 19 84,
by and between COX CABLE Lubbock ("Company") and
Mr. Barnes of West Texas Property Management
("Owner").

W I T N E S S E T H :

WHEREAS, Company has been granted a cable television franchise by City of Lubbock for a period of 15 years (the "Franchise"), and is obligated by the Franchise to make cable television service available to areas of the municipality on a non-discriminatory basis; and

WHEREAS, Company is meeting this obligation by providing areas of the City with access to cable communication service, including channels of community and public service programming; and

WHEREAS, Owner wishes to ensure its tenants; access to the Company's cable service, as it recognizes the potential increase in building occupancy and the accompanying increase in rental revenue resulting from the availability of this cable service;

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties, intending legally to be bound, agree as follows:

1. Premises. Owner holds title to that certain real property consisting of 70 apartment, condominium, mobile home or similar multiple dwelling units located in Lubbock, Texas at the address commonly known as 1810 3rd (Casa Orlando).
2. Purpose and Term of Agreement. Company agrees to make cable television service available to the residential dwelling units owned by Owner for the term of this Agreement. This Agreement shall be effective upon its execution by the parties and shall remain in effect during the term of the Franchise and any and all renewals or extensions thereof.
3. Ownership. All of the equipment installed by Company is and shall at all times remain the property of company, and shall be

used exclusively for Company operations. All converters supplied by Company for the use of viewers shall remain the property of Company. .

4. Access. Owner grants to Company the right for the term of this Agreement to enter upon and over the premises during reasonable hours to install, inspect, improve, maintain, service, repair remove and/or replace the equipment, and to do all other things necessary to ensure its continued operation. Owner further grants to Company the right to enter upon the premises during reasonable hours for the purpose of soliciting subscriptions from occupants for cable television service on an individual basis, and from time to time to connect, transfer, and disconnect such service. Upon termination of service to any residential dwelling unit, or upon termination of this Agreement for any reason whatsoever, Company shall have the right to enter the premises and remove its equipment.
5. Installation and Maintenance. Company will exercise due care in the installation and maintenance of the system and will perform all work in a workmanlike manner and in accordance with good engineering practices. Any damage caused by Company during installation, repair, or removal will be repaired to the reasonable satisfaction of Owner.
6. Promotional Material. Company shall have the right to request, and Owner shall submit, all of Owner's proposed advertising and promotional materials for Owner's residential dwelling space or units referring to Company's services prior to any actual use of said materials by Owner. Owner shall indemnify Company from any loss, damage, or expense, including attorney fees resulting from the unauthorized use of said material.
7. Interference. Owner shall not use any equipment that causes frequency interference or is otherwise incompatible with Company's equipment or its obligation to provide service pursuant to the franchise (including any and all renewals thereof). In addition, Owner shall not move, disturb, alter, or change any of the equipment installed by Company on the premises. Owner shall not connect

or attach, directly or indirectly, any additional television sets or other devices to Company's equipment. Owner shall not ^{knowingly} authorize or permit any person to commit or engage in any of the foregoing acts.

8. Insurance. Company agrees to maintain in force adequate public liability and property damage insurance to protect Owner against loss or damage resulting from said installation or maintenance upon the premises.

9. No Agency. It is expressly understood that Company is an independent business organization in no way associated with Owner and has no authority to act for or on behalf of Owner or to bind Owner to any contract or in any other manner to represent that it has any of the foregoing authority without the express approval in writing of Owner.

It is further understood that Owner is an independent business organization in no way associated with Company and has no authority to act for or on behalf of Company to bind Company to any contract or in any other manner to represent that it has any of the foregoing authority without the express approval in writing of Company.

10. Utility Poles. Owner understands and agrees that, in providing cable television service, Company shall, with the exception of underground utilities, make use of utility poles owned in whole or in part by telephone and electric power companies, or both, as well as easements over and under both public and private property, and that the continued use of said poles and easements is in no way guaranteed. In the event that continued use of said poles and easements is denied to Company for any reason, Company will make every reasonable effort to provide service over alternate routes. Owner agrees that it will make no claims and will not undertake any action against said local utility companies and/or Company and/or public or private property owners, if cable television service provided hereunder is interrupted or discontinued as a result of the use of said poles and/or easements being denied to Company for any reason.

11. Act of God. Company shall not be responsible for damages by reason of a failure to transmit audio, video, or data signals or deliver its signals at points of interconnect, nor for failure otherwise to meet its obligations under this Agreement, where such failure is the result of any labor dispute, war, riot, insurrection, vandalism, civil commotion, fire, flood, accident, storm, or any Act of God or any other cause beyond the reasonable control of Company.
12. Owner's Warranties. Owner warrants that there are no leases or contracts, nor will Owner enter into any leases or contracts, with tenants, lessees or other occupants of its premises which would prevent Company from providing cable service and charging and receiving its normal residential subscriber rates to such tenants, lessees and/or occupants.
13. Indemnification. Company agrees to indemnify and hold Owner harmless and defend Owner from and against any and all claims, liabilities, loss, cost, damage, or expenses, including reasonable attorney fees, arising out of or in connection with any claim resulting from the conduct of Company's business.
- Owner agrees to indemnify and hold Company harmless and defend Company from and against any and all claims, suits, proceedings at law or in equity and any and all other claims, liabilities, loss, cost, damage, or expenses, including reasonable attorney fees, arising out of or in connection with any claim resulting from the renting, leasing or purchase of Owner's residential dwelling units or the conduct of Owner's business.
14. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of Company and Owner and their respective successors and assigns.
15. Amendments. This instrument may not be amended orally but only by an instrument in writing signed by the parties. This Agreement contains the entire agreement of the parties and supercedes any and all other agreements or understandings, oral or written, made by the parties. It is the understanding of both parties that Company does not make to Owner, or any other person,

any particular or general warranties, direct or indirect, express or implied , other than as specifically set forth in this Agreement or any amendments to this Agreement.

16. Disputes. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees, costs and necessary disbursements in addition to any other relief to which said party may be entitled.

17. Governmental Rules. This Agreement shall be governed by the laws of the State of Texas, including the Uniform Residential Landlord and Tenant Act as applicable (if there enacted), except where the laws of the United States have precedence.

This Agreement and the obligations of the parties shall be subject to all applicable laws, rules, regulations, franchise ordinances, court rulings, administrative orders, and presidential decrees, including, without limitation, the Communications Act of 1934 and the Rules and Regulations of the Federal Communications Commission, as they may be amended from time to time. Any action taken or any failure to perform any action by Company in order to comply with an applicable law, rule, regulation, applicable franchise ordinance, court ruling, administrative order or presidential decree shall not constitute a breach of this Agreement and the responsibilities of the parties shall be readjusted accordingly.

18. Easements. Owner grants to Company an easement for access to the premises at all times for the purpose of maintaining, repairing, replacing, improving, removing, installing, connecting, disconnecting or transferring its equipment and for the purpose of soliciting subscriptions from the occupants of the premises. This easement shall be binding on any and all successors in interest or assigns.

19. Cooperation. Owner and Company agree to cooperate fully and promptly in carrying out the terms of this Agreement. Owner agrees to execute any and all documents as may reasonably be requested by Company to evidence and effectuate the rights granted to Company hereunder under applicable law.

THIS ACT REPEALED

Now

CH 57

Property Code

20. Acceptance. Owner agrees that the mutual benefits, promises and covenants contained in this Agreement constitute full and adequate consideration to Owner for the rights granted to Company hereunder. Owner agrees to waive, and hereby waives, its right to all claims which it may have under any ordinance, statute, or constitution, or otherwise as a result of this Agreement, for any additional compensation from Company.

DATED: November 28, 1984

Cox Cable Lubbock

Accepted by *[Signature]*

Multi-Unit Supervisor
Title

DATED: December 6, 1984

OWNER

W. E. Mellick

James E. Barnes O/M
Accepted by

West Texas Property Management

#72

SERVICE AGREEMENT

This agreement, entered into this 3rd day of MARCH, 19 89, by and between COMMUNICATIONS AND CABLE OF CHICAGO, INC., with its principal place of business at 5711 S. Western Avenue, Chicago, Illinois 60636 (hereinafter referred to as CCTV) and H.A. CASER & ASSOCIATES located at 3767 N. RACINE 60613 (herein after referred to as Owner).

In consideration of the mutual covenants, benefits and promises set out herein, the parties mutually agree as follows:

CCTV is the holder of a municipal franchise for the construction and operation of a cable television system in the City of Chicago.

Owner is the Owner of real estate located within the City of Chicago constructed there in the form of a housing development known as _____

address 1140 N. CASACCE

wherein some or all of the tenants/homeowners in the within property are or may be desirous of obtaining cable television service from CCTV.

In order to provide such service, CCTV must make its facilities and equipment available to such tenants/homeowners so that they might obtain such service.

THEREFORE, Owner, its heirs, successors and assigns, agree to permit CCTV, its heirs successors and assigns to construct, install, maintain its facilities in and on the property of the Owner in such locations as required by CCTV including all aerial and underground easements, pedestal locations, guy locations and power supply locations.

CCTV agrees that the construction, installation and maintenance of its facilities will conform to all reasonable conditions necessary to protect the convenience, safety and well being of the tenant or the Owner of the property. There shall be no cost to the Owner.

CCTV agrees to indemnify Owner for any damage or liability arising from or related to the construction, installation, operation or removal of such facilities by CCTV.

The Ownership of all wire, cable, equipment and facilities shall be in and remain in CCTV. No part of such facilities shall become or be considered a fixture of the real estate upon which, or in which, it is located.

Owner shall permit CCTV and its authorized agents free and unobstructed access to, and egress from the property for the purpose of inspection, installation, marketing and servicing.

It is understood and agreed that CCTV may abandon its facilities in place and shall not be responsible for the removal thereof if such abandoned facilities will not interfere with the use and occupancy of the premises. Facilities will not be considered to be abandoned unless written notice to that effect is given by CCTV to Owner.

Owner agrees to notify CCTV in the event of damage to said facilities.

Owner represents and warrants that it is the Owner of the above-described real property and has the right to grant this easement. This easement shall inure to the benefit of and be binding upon the respective heirs, personal representatives, successors and assigns of the parties and shall remain in full force and effect so long as the right-of-way shall be utilized for the purposes for which this easement is granted.

The execution of this contract is dependent upon the Owner's approval of CCTV's construction design.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 3rd day of MARCH, 19 89

_____(CCTV) OWNER,

Bill Parkins

Design Approval Thomson J. Luyten

Project Coordinator

Owner

Contractor



A Vidéotron Company

1250 East Hallandale Beach Blvd.
Suite 700
Hallandale, Florida 33009

Dear Allington Towers Resident,

OpTel is ready to begin construction of the new cable TV system in your building. This process will take approximately eight weeks and will be completed in several phases. Phase one will consist of installing new inside wiring within each individual unit. This necessary because the existing inside wiring does not meet OpTel's state of the art technical specifications. This process will of course require that our crews gain access to your unit. You will be advised as to when we will be working on your floor so that you can arrange for some one to let us in if you are not at home.

Tiffany Communications is our authorized contractor for this phase of the project. They employ experienced professional installation technicians who will install the new cable within your unit by concealing as much of the new wire as possible. They will coordinate the scheduling of this work with the building management so they can provide advance notice of when we will need access to your unit.

Additional phases of this project will include installing the main cables and signal receiving dish. Scheduling of this work is subject to permit approvals and equipment delivery.

If you have any concerns or questions in this matter, I can be reached at 954-454-7242 extension 231.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Philip C. Lynch', with a long, sweeping horizontal line extending to the right.

Philip C. Lynch
Regional Construction Manager
OpTel

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

COMMUNICATIONS & CABLE OF
CHICAGO, INC., an Illinois corporation,
and LaSALLE TELECOMMUNICATIONS, INC.,
an Illinois corporation,
both d/b/a CHICAGO CABLE TV,

Plaintiffs,

v.

H.A. LANGER & ASSOCIATES, and
PREFERRED ENTERTAINMENT, f/k/a
PEOPLE'S CHOICE,

Defendants.

No. 97 CH 326

TEMPORARY RESTRAINING ORDER

This cause coming to be heard, on January 21, 1997, on the Verified Motion for Temporary Restraining Order ("Verified Motion") of COMMUNICATIONS & CABLE OF CHICAGO, INC. and LaSALLE TELECOMMUNICATIONS, INC., both d/b/a CHICAGO CABLE TV (jointly "Chicago Cable"), said motion being based on the Verified Complaint for Declaratory, Injunctive and Other Relief ("Verified Complaint"), and the Court having considered the arguments of law and fact set forth in the Verified Complaint, the Verified Motion, the Answer of Defendant H.A. Langer & Associates ("Langer") and the Memorandum in Opposition to Plaintiffs' Request for a Temporary Restraining Order filed by Defendant Preferred Entertainment, f/k/a People's Choice ("Preferred"), as well as those made by counsel at the hearing, and the court being fully advised in the premises,

THE COURT FINDS:

1. Chicago Cable possesses clearly ascertainable rights that need protection in connection with defendants utilization of Chicago Cable's equipment and coaxial cable wire installed by Chicago Cable as part of the internal distribution system at the Apartments referenced in Paragraph 3 of the Verified Complaint (hereinafter, "the Apartments").

2. Chicago Cable has shown a likelihood of success on the merits of proving its claim to ownership of the equipment and coaxial cable wire installed by Chicago Cable as part of the internal distribution system at the Apartments and that defendants have inappropriately utilized and taken as their own that which defendants had no right to utilized and take, namely, Chicago Cable's equipment and coaxial cable wire installed by Chicago Cable as part of the internal distribution system at the Apartments, and that defendants need to return possession and utilization of that property back to Chicago Cable.

3. Chicago Cable has shown that it will be irreparably injured and that there is no adequate remedy at law available to it to redress its claims. Defendants' actions are of a continuing nature and without injunctive relief, Chicago Cable will continue to suffer injury by reason of these actions. Any possible remedy at law which might be available to Chicago Cable will not be as clear, complete and as practical and efficient to the ends of justice as will the injunctive relief sought.

4. The *status quo ante* should be restored. The court finds that the *status quo ante* is that state of affairs prior to any unauthorized utilization and taking by Defendants of Chicago Cable's equipment and coaxial cable wire installed by Chicago Cable as part of the internal distribution system at the Apartments, and the corresponding disconnection of Chicago Cable's

cable television service to the residents of the Apartments who were subscribers to or otherwise received Chicago Cable's cable services.

5. Pursuant to Section 11-103 of the Code of Civil Procedure, the court finds that based upon the nature of the actions of Defendants and for the other reasons stated in open court, a bond is not required.

IT IS HEREBY ORDERED:

1. Defendants, their partners, subsidiaries, affiliates, officers, agents, representatives, servants, employees, attorneys and all persons in active concert and participation with them are restrained and enjoined and commanded to do or, as the case may be, desist from doing or attempting to do, or cause to be done, directly or indirectly, by any means, methods or devices whatsoever, or by any person or persons whomsoever, either or any or all of the following acts:

- (a) Within forty-eight (48) hours of the entry of this Order, Defendant Preferred shall discontinue its use, in any manner or through any means, of any portion of the equipment and coaxial cable wires installed by Chicago Cable as part of the internal distribution system at the Apartments and Preferred shall terminate any connection to any such equipment and coaxial cable wires.
- (b) Commencing immediately upon the expiration of forty-eight (48) hours from the entry of this Order, (i) Defendant Preferred is prohibited from using, tampering with or making connections to any portion of the equipment and coaxial cable wires installed by Chicago Cable as part of the internal distribution system at the Apartments; (ii) Defendants are prohibited from interrupting or interfering with any tenant at the Apartments from receiving Chicago Cable's cable service; and (iii) Defendants are prohibited from assisting, aiding, abetting or conspiring with and permitting and acquiescing in the use of, tampering with and making connections to any portion of the equipment and coaxial cable wires installed by Chicago Cable as part of the internal distribution system at the Apartments;

- (c) Immediately upon the disconnection and discontinuance of use by defendant Preferred in accordance with subparagraph (a), above, Chicago Cable shall have the unrestricted and unhindered right to reconnect all units of the Apartments which had received Chicago Cable's cable services prior to the Defendants' disconnection of those subscribers through Defendants' utilization and taking as their own Chicago Cable's equipment and cable wire installed by Chicago Cable as part of the internal distribution system at the Apartments;
- (d) Defendants may not in any way deny or interfere with Chicago Cable's access to the Apartments for the purpose of (i) operating and maintaining its cable system; (ii) taking those actions provided in subparagraph (c), above; (iii) servicing and/or maintaining any existing or new subscriber of Chicago Cable's cable services at the Apartments; or, (iv) the solicitation of customers to its cable service at the Apartments;
- (e) Defendants may not in any way interfere with Chicago Cable's operation and maintenance of its internal distribution system at the Apartments, including the equipment and coaxial cable wire installed by Chicago Cable as part of that internal distribution system at the Apartments for the purpose of providing cable service to the tenants;
- (f) Defendant Langer is prohibited from allowing any other provider of video service, including other franchise cable operators and MATV companies, to utilize, tamper with or disconnect any portion of the equipment and coaxial cable wire installed by Chicago Cable as part of that internal distribution system at the Apartments.

2. A Notice shall be delivered by Chicago Cable, with the cooperation of Defendant Langer, to each unit at the Apartments within 24 hours of the entry of this Order in the form attached hereto as Exhibit A.

3. This Order shall be effective immediately and shall remain in force for a period of ten days from the date hereof, except by further order of this Court allowing an appropriate

extension.

4. This matter is set for status on Plaintiffs' Motion for Preliminary Injunction at 9:30 a.m. on January 30, 1997 without further notice.

5. This Order shall be filed forthwith in the office of the Clerk of the Courts and entered of record therein.

Issued at 6:05 a.m. (p.m.) this 22nd day of January, 1997.

ENTERED CLERK OF THE CIRCUIT COURT AURELIA PUCINSKI JAN 22 1997 JUDGE DOROTHY KINHAIRD #228 DEPUTY CLERK
--

ENTER:

Honorable Dorothy Kinnaird

James K. Meguerian
Scott R. Fradin
D'Ancona & Pflaum (90221)
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2000

Attorneys for Plaintiffs



NOTICE TO TENANTS

As you know, your apartment was recently disconnected from Chicago Cable TV's cable services by Preferred Entertainment.

This is to advise you that on January 22, 1997, the Circuit Court of Cook County, Illinois, entered an Order that provides that Preferred Entertainment is prohibited from using the internal distribution system for cable and video that is located in your building based upon the ownership of that system claimed by Chicago Cable TV.

Within the next 48 hours, those apartments previously served by Chicago Cable TV will be reconnected to Chicago Cable TV's cable services in a manner that will provide the minimum of inconvenience to you.

Now or in the future should you choose to use a cable or video provider other than Chicago Cable TV, the coaxial cable and other equipment which now provides cable or video signal to your apartment and the present distribution system within the building cannot be used by any provider of such services other than Chicago Cable TV.

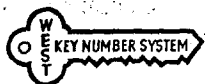
Dated: January 23, 1997

Chicago Cable TV
H.A. Langer & Associates
Preferred Entertainment

III.

For the foregoing reasons, we affirm Leshuk's conviction and sentence.

AFFIRMED.



MULTI-CHANNEL TV CABLE COMPANY, d/b/a Adelphia Cable Communications, Plaintiff-Appellant,

v.

CHARLOTTESVILLE QUALITY CABLE CORPORATION, a Virginia corporation; Charlottesville Quality Cable Operating Company, a Virginia corporation; Management Services Corporation of Charlottesville, a Virginia corporation; Madison Limited Partnership, a Virginia limited partnership; Cabell Limited Partnership, a Virginia limited partnership; Brandon Limited Partnership, a Virginia limited partnership; Four Seasons Apartments Limited Partnership, a Virginia limited partnership; Sherwood Manor Limited Partnership, a Virginia limited partnership; George B. McCallum, III, Trustee of Oxford Hill Land Trust; David W. Kudravetz, Trustee of Oxford Hill Land Trust; L-R Investments, a Virginia limited partnership, Defendants-Appellees.

MULTI-CHANNEL TV CABLE COMPANY, d/b/a Adelphia Cable Communications, Plaintiff-Appellee,

v.

CHARLOTTESVILLE QUALITY CABLE CORPORATION, a Virginia corporation; Charlottesville Quality Cable Operating Company, a Virginia corporation; Management Services Corporation of Charlottesville, a Virginia corporation; Madison Limited Partnership, a Virginia limited partnership; Cabell Limited Partnership, a Virginia limited partnership; Brandon Limited Partner-

ship, a Virginia limited partnership; Four Seasons Apartments Limited Partnership, a Virginia limited partnership; Sherwood Manor Limited Partnership, a Virginia limited partnership; George B. McCallum, III, Trustee of Oxford Hill Land Trust; David W. Kudravetz, Trustee of Oxford Hill Land Trust; L-R Investments, a Virginia limited partnership, Defendants-Appellants.

Nos. 94-2340, 94-2383.

United States Court of Appeals,
Fourth Circuit.

Argued June 7, 1995.

Decided Sept. 18, 1995.

Cable television operator brought action against competitor, owners of multidwelling units (MDUs), and managers of MDUs for claims arising from dispute between cable television operators, whereby competitor disconnected service of operator to certain MDUs. The United States District Court for the Western District of Virginia, B. Vaughn Crigler, United States Magistrate Judge, granted summary judgment in favor of defendants on three claims, held bench trial on remaining claims, and then entered judgment in favor of cable operator on all claims but one. On appeal, the Court of Appeals, Hamilton, Circuit Judge, held that: (1) easements allegedly held by disconnected cable operator through its co-use of utility easements did not extend to interior of MDUs; (2) operator failed to meet all elements necessary to create easements by estoppel; (3) determination that home run systems installed in MDUs by operator did not become "fixtures" was supported by evidence; (4) Virginia regulation that prohibited landlord from accepting "kickback" from provider of cable television service in exchange for giving tenants access to service did not constitute "regulatory taking"; and (5) award of \$191,594 to cable television operator for prospective lost profits was supported by evidence.

Affirmed.

1. Easements ⇨1

"Easement" is privilege to use land of another in particular manner and for particular purpose; it creates burden on servient tract and requires that owner of that land refrain from interfering with privilege conferred for benefit of dominant tract.

See publication Words and Phrases for other judicial constructions and definitions.

2. Easements ⇨5, 12(1), 15.1**Estoppel** ⇨52(8)

"Easement" may be created by express grant or reservation, by implication, by estoppel or by prescription.

3. Easements ⇨42

If "easement" has been created by express grant, rights of parties must be ascertained from granting language, and extent of easement cannot be determined from any other source.

4. Telecommunications ⇨449(2)

Easements allegedly held by disconnected cable operator through its co-use of utility easements did not extend to interior of multidwelling units (MDUs), but were limited to exterior and, therefore, disconnected operator could not prevail in its claim against disconnecting cable operator, MDU owners, and others, who had entered into exclusive provider agreements, for interference with co-use of easements, where instruments granting utility easements did not contain language permitting easements to extend to interiors of building structures and where maps accompanying instruments showed exact locations of easements to be exterior to MDUs.

5. Licenses ⇨43, 59

Under Virginia law, "license" is privilege to do one or more acts on another's land without possessing any interest therein, and therefore license is revocable by licensor at any time.

See publication Words and Phrases for other judicial constructions and definitions.

6. Torts ⇨11

Because "license" is revocable at any time, Virginia law does not recognize claim

for tortious interference with an irrevocable license.

7. Estoppel ⇨87

Easement may be created by estoppel when proof exists that party was induced by another to rely on existence of easement that did not exist in fact, and first party did indeed reasonably rely on existence of easement to his injury.

8. Telecommunications ⇨449(2)

Disconnected cable television operator failed to meet all elements necessary to create easements by estoppel, giving operator right to service tenants at multidwelling units (MDUs) through home run systems it installed, which allowed each tenant to negotiate individual subscriptions for cable service, where MDU owners did nothing more than consent to operator's installation of its home run systems, where, with one exception, owners never promised operator that it could service tenants through home run systems for any agreed length of time, and where operator received cable fees for entire time it provided cable service to MDUs.

9. Federal Courts ⇨844, 850.1

On appeal from bench trial, Court of Appeals may only set aside findings of fact if they are clearly erroneous, and Court must give due regard to opportunity of district court to judge credibility of witnesses. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

10. Federal Courts ⇨853

Finding is "clearly erroneous" when although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that mistake has been committed.

See publication Words and Phrases for other judicial constructions and definitions.

11. Fixtures ⇨1

Under Virginia law, determining whether particular chattel becomes fixture of real property or remains personalty involves weighing degree of permanency with which chattels are annexed to realty; weighing adaptation of chattels to use or purpose to which realty is devoted; and weighing inten-

tion of owner of chattels to make them permanent accession to property.

Fourteenth Amendment. U.S.C.A. Const. Amends. 5, 14.

12. Fixtures ⇨4

Intention of party making annexation is paramount and controlling consideration in determining whether particular chattel becomes fixture of real property or remains personalty.

17. Eminent Domain ⇨2(1)

Unconstitutional "taking" may occur through physical invasion or regulation. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

13. Fixtures ⇨35(5)

Determination that home run systems installed in multidwelling units (MDUs) by disconnected cable television operator, which allowed each tenant to negotiate individual subscriptions for cable services, were annexed to property with some degree of permanency but not so much that they could not be easily removed, for purposes of determining whether they became "fixtures" of MDUs over which MDUs exercised dominium and control, was supported by evidence that district court made finding after personally inspecting home run systems at several MDUs.

18. Eminent Domain ⇨2(1)

Factors in distinguishing "taking," requiring just compensation, from "regulation" include character of governmental regulation; whether regulation has deprived property owner of all economically viable uses of his property; whether regulation has deprived owner of his reasonable investment-backed expectations; and whether regulation substantially advances legitimate state interest. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

See publication Words and Phrases for other judicial constructions and definitions.

14. Fixtures ⇨35(5)

Determination that cable television operator did not intend to make home run systems installed in multidwelling units (MDUs), which allowed each tenant to negotiate individual subscriptions for cable services, permanent accessions to MDUs, for purposes of determining whether they became fixtures of MDUs over which MDUs exercised dominium and control, was supported by evidence that cable operator was solely responsible for service and maintenance of home run systems, in absence of evidence that cable operator transferred ownership of home run systems to MDUs at time of installations.

19. Eminent Domain ⇨2(1.1)

Virginia regulation that prohibited landlord from demanding or accepting payment from provider of cable television service in exchange for giving tenants access to service did not constitute "regulatory taking" requiring just compensation, where code merely prohibited use of property, not physical invasion, where regulation only prohibited landlords from deriving income through "kick-backs" from cable providers which was minimal in relation to greater income they derived from leases, and where regulations advanced state's interest in preventing unfair competitive market for cable television providers. U.S.C.A. Const.Amend. 5; Va.Code 1950, § 55-248.13:2.

See publication Words and Phrases for other judicial constructions and definitions.

15. Federal Courts ⇨776

Court of Appeals reviews constitutional challenge to statute de novo.

20. Damages ⇨114

If defendant is liable for tortious interference with plaintiff's prospective contractual relationships, proper measure of plaintiff's damages is present value of lost profits resulting from defendant's actions.

16. Constitutional Law ⇨280

Eminent Domain ⇨1

Fifth Amendment provides that private property may not be "taken" by federal government without just compensation, and this prohibition equally applies to states through

21. Damages ⇐190

In order to recover lost profits for defendant's tortious interference with plaintiff's prospective contractual relationships, plaintiff is not required to prove amount of its damages with mathematical precision; rather, plaintiff is only required to produce sufficient facts and circumstances that would permit trier of fact to make intelligent and reasonable estimate of amount.

22. Federal Courts ⇐872

Court of Appeals will not set aside award of compensatory damages as excessive unless it is against clear weight of evidence, or is based upon evidence which is false, or will result in miscarriage of justice.

23. Damages ⇐137, 190

Award of \$191,594 to cable television operator for loss of profits from prospective cable subscriptions due to competitor's tortious interference with operator's contracts with tenants at multidwelling units (MDUs) was supported by competitor's economics expert's testimony that cable operator's expert's testimony, that operator suffered \$818,700 in damages, was inflated due to his failure to take into account competition.

ARGUED: John Douglas McKay, Barrick & McKay, Charlottesville, VA, for appellant. Deborah Colleen Costlow, Winston & Strawn, Washington, DC, for appellees. **ON BRIEF:** David C. Wagoner, Barrick & McKay, Charlottesville, VA; Randall D. Fisher, John B. Glicksman, Adelphia Cable Communications, Coudersport, PA; Philip J. Kantor, Bienstock & Clark, Miami, FL, for appellant. Alan G. Fishel, Winston & Strawn, Washington, DC, for appellees.

Before WILKINSON, HAMILTON, and MICHAEL, Circuit Judges.

1. These MDUs are Preston Square Apartments (owned by L-R Investments, a limited partnership), Cambridge Square Apartments (owned by Madison Limited Partnership), Ash Tree Apartments and Townhouses (owned by Cabell Limited

Affirmed by published opinion. Judge HAMILTON wrote the opinion, in which Judge WILKINSON and Judge MICHAEL joined.

OPINION

HAMILTON, Circuit Judge:

This appeal raises numerous issues arising from a dispute between competing cable television operators in the City of Charlottesville, and Albemarle County, Virginia, whereby one of the cable operators disconnected the service of the other to certain multidwelling units (MDUs) in those areas. The disconnected cable operator brought suit against the disconnecting cable operator, the owners of the MDUs, and the company that managed all but one of the MDUs, alleging these parties had committed various torts in conjunction with the disconnection of its service. We affirm.

I.

A.

Appellant/Cross-Appellee Multi-Channel TV Cable Company d/b/a Adelphia Cable Communications (Adelphia) and Appellee/Cross-Appellant Charlottesville Quality Cable Corporation (CQC) are competing cable television providers in the City of Charlottesville and Albemarle County, Virginia. Adelphia has been a franchised provider of cable television in Charlottesville and Albemarle County since 1974. In 1981, Adelphia installed cable distribution systems in six MDUs¹ at its own expense. These systems, known as "home run" systems, replaced the previous "bulk service" systems in which the landlords subscribed to the cable television service in bulk, paid Adelphia one monthly fee, and provided their tenants cable television as part of their lease obligations. The installation of the home run systems entailed installing junction boxes at the end of Adelphia's signal feeder lines at the MDUs and running separate cable wires from the junc-

ed Partnership), Brandon Apartments (owned by Brandon Limited Partnership), Oxford Hill Apartments (owned by Oxford Hill Land Trust), and Country Green Apartments (owned by Sherwood Manor Limited Partnership).